IN THE

Supreme Court of the United States

No. .....

L. L. SKAGGS, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the United States Board of Tax Appeals (R. 14-21) is reported at 38 B. T. A. 921. The opinion of the Circuit Court of Appeals, Senior Circuit Judge Foster dissenting, (R. 41-46) is reported at 122 F. (2d) 721.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered September 22, 1941. By order of Mr. Justice Black, dated November 28, 1941, the time for filing a petition for certiorari was extended to and including January 21, 1941. Jurisdiction to issue the writ requested is found in Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

The facts are stated at pages 1 and 2 of this document. For brevities sake, they will not be repeated here.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the rent from petitioners separately owned real estate located in California is the separate income of the petitioner, rather than community income, as provided by the law of Texas where petitioner is domiciled.

2. The Circuit Court of Appeals erred in holding that the right to receive income from land constitutes an interest in realty so that the income, for Federal tax purposes, is governed by the law of the situs of the realty, rather than the law of the domicile of the recipient of the income.

Questions Presented.

1. Are the rents from petitioner's separately owned real estate located in California community income to the petitioner domiciled in Texas?

2. Is the right to receive income from land an interest in realty so that the income is governed by the law of the situs of the realty for Federal tax purposes? Or is the said right a chose in action which is governed by the law of the domicile of the recipient of the income?

Petitioner does not seek certiorari in the other issue decided below, namely: Is the gain from the sale of petitioner's separately owned corporate stock community or separate income?

Statutes Involved.

The pertinent statutes involved will be found in the Appendix, *infra*, pp. 12-15.

ARGUMENT.

I.

The decision below is in conflict with decisions of this Court.

The decision below is in conflict with decisions of this Court which hold that a tax on income from land is separate and distinct from a tax on the land.

In *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, Cohn challenged the New York statute levying a tax on "entire net income," which included rents received by Cohn from New Jersey realty. Cohn contended that the tax was in fact a tax on realty.

In the case at bar the decision below (Senior Circuit Judge Foster dissenting) can stand only on the ground that the right to receive income is an interest in realty. Yet the present Chief Justice in the *Cohn* case states (p. 314):

> "Neither analysis of the two types of taxes, nor consideration of the bases upon which the power to impose them rests, supports the contention that a tax on income is a tax on the land which produces it."

At page 315, it is stated:

> " * * * income derived from real estate may be taxed to the recipient at the place of his domicile, irrespective of the location of the land, * * *"

In the case at bar, we are concerned with realized income from realty. The law of the situs of the realty has no effect upon the income therefrom, insofar as the recipient is concerned. It is stated in the *Cohn* case (p. 316):

> "Here the subject of the tax is the receipt of income by a resident of the taxing state, and it is within its taxing power, even though derived from property beyond its reach."

If the law is established as shown by the *Cohn* case that an income tax is a tax on the receipt of income and not on

its source, and that the state of domicile can tax income from real estate situated outside the state, it necessarily follows that such income must be taxed in accordance with the laws of the state of domicile. In Texas rents from separate property are community income, so it is obvious that the rents here involved are community.

In the case at bar the rule of the *Cohn* case must apply. Otherwise, we would have a tax on real estate, which is a direct tax prohibited by the Constitution.

The Court below says the taxpayer's interest which is taxed is an interest in real estate (R. 45) "an immature crop, like unaccrued rent, is a part of the land; * * *". However, here we are not dealing with unaccrued rent, but with accrued income which is the only income which can be taxed. The analogy to immature crops is specious. Such immature crops would not be taxed as income. However, the income from the mature crops which are harvested and sold would be taxed and the income would be governed by the law of the domicile of the owner. Any other rule would result in boundless confusion, not only to taxpayers but to the administrative officials.

Real estate mortgages certainly represent an interest in realty. Yet, for the purposes of taxation, a mortgage is regarded as situated at the domicile of the creditors. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, involved a situation where Kirtland, a resident of Connecticut, owned certain mortgage bonds secured by Illinois real estate. Each bond provided that "it is made under, and is, in all respects, to be construed by the laws of Illinois". In upholding a personal property tax assessed on the bonds in Connecticut, this Court states (p. 498):

> "That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor."

II.

The decision below is in conflict with the established law that rents due or past due are money due and payable and, as such, are choses in action governed by the law of the domicile of the owner.

Little can be added to the well-reasoned opinion of the Board of Tax Appeals (R. 16-21) on this issue. The Board points out:

> "The respondent contends, however, that the income from the rents from the real estate situated in California must be determined under the laws of that state, which declare them to be the separate property of the owner of the real estate, and that the laws of the State of Texas are not controlling of the question.
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> "We do not agree with this contention. While under the laws of the State of California rents from the separate estates of the spouses are their separate property—see section 163, Civil Code of California, 1927—this is not the law in the State of Texas as shown above, and in our opinion the status of the income from the rents in question must be determined under the laws of the State of Texas, where the petitioner was domiciled. Rent is said to be a chose in action, that is, personal property. *Richardson* v. *Neblett,* 122 Miss. 723; 84 So. 695.
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> "It was said in *State* v. *Royal Mineral Association,* 132 Minn. 232; 156 N. W. 128, that rents unaccrued are not personal property but are a part of the land until severed, and that rents due or past due are 'simply an item of money due and payable.' See also *People* v. *McComber,* 7 N. Y. S. 71. In *Broadwell* v. *Banks,* 134 Fed. 470, the court said:
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> * * * In the absence of any statutory provision to the contrary, it is elementary that the rents which accrued during the lifetime of the owner of the leased premises are personal property, and go to his personal representatives as assets of the estate, * * *
>
> "The ownership and disposition of personal property is uniformly governed by the lex domicilii. *Black*

v. *Zacharie & Co.*, 3 Howard 482; *Whitney* v. *Dodge*, 105 Cal. 192; 38 Pac. 636. In *Thayer* v. *Clarke* (Tex. Civ. App.), 77 S. W. 1050, the court said:

* * * It is well settled that as to all personal property acquired during coverture the law of the matrimonial domicile controls, such property having in theory no fixed situs. As to all real estate so acquired the law of the state in which it is situated controls, * * * See also *Snyder* v. *Stringer*, 116 Wash. 131; 198 Pac. 733; *Douglas* v. *Douglas*, 22 Idaho 336, 125 Pac. 796; *Kraemer* v. *Kraemer*, 52 Cal. 305.

"In *Thayer* v. *Clarke*, *supra*, the court further said:

* * * It is also the law in this state (Texas) that all personal property acquired during marriage is presumed to have been earned by one or the other or both members of the community during the existence of the marriage, and this presumption prevails until it is made to appear that it was owned by the one or the other prior to the marriage, or was acquired during marriage by gift, devise, or descent. * * *

"The rents here in question were not owned by the petitioner before marriage and were not acquired by gift, devise, or descent. They were therefore earnings of the community under the Texas law.

"We think that under the laws of the State of Texas petitioner's wife had a vested interest equal to that of the petitioner in the rents from petitioner's real estate situated in the State of California at the time they were received and that accordingly only one-half of such income is taxable to the petitioner in his separate return. *Hopkins* v. *Bacon*, *supra*.

"If the property here in dispute, that is, the rents from petitioner's real estate, had been acquired by the petitioner as his separate property while domiciled in California and brought into the State of Texas when he established his domicile there, a different rule might apply. See *In re Arms' Estate*, 186 Cal. 554; 199 Pac. 1053; §649 McKay, Community Property. It is generally recognized that vested property rights are not affected by the owner's change of domicile and the removal of the property from a community state to a non-community state or vice versa."

The Board's reasoning is supported by many other authorities:

Broadwell v. *Banks*, 134 Fed. 470, says, in addition to the statement quoted by the Board (p. 473):

> "It is equally elementary law, universally recognized, in most of the states of the Union, that the rentals which had accrued at the time of the lessor's decease were choses in action of the testator's estate."

Corpus Juris states the rule in Volume 36, page 289, as follows:

> "Rent, or more accurately, the right to receive rent, is a species of incorporeal hereditament and is to be classed as real, as distinguished from personal, property. It is an interest or estate in land which may be the subject of a grant or devise. Until separated from the reversion, it constitutes a part of the land and passes as incident to a transfer of the reversion. *Rents which have become due constitute mere choses in action, and are personal property.*" (Italics supplied.) Cited in support of the italicized statement are *Broadwell* v. *Banks*, 134 Fed. 470; *Hayden* v. *McMillan*, 4 Tex. Civ. A. 479, 23 S. W. 430, and other cases.

III.

The rule established by the Court below opens up an avenue of tax avoidance.

If the rule established below is correct, an easy avenue of tax avoidance is available to persons residing in non-community states. They can invest in real estate located in Texas or in other community property states having the Texas rule and the rents will be community income, with the resulting tax benefits. The Court below cites in support of its position *Hammonds* v. *Commissioner*, 106 F. (2d) 420 (C. C. A. 10). In that case Mrs. Hammonds, a resident of Oklahoma, in 1930 received certain oil and gas leases on lands in Texas in exchange for personal services. In 1931 certain of the said leases were sold. In Texas oil and gas

leases constitute an interest in real estate and if Mrs. Hammonds had been a resident of Texas, the gain would have been community. The Board of Tax Appeals, (38 B. T. A. 4) held the gain was separate and the Government acquiesced. 1938-2 C. B. 14. The Tenth Circuit reversed, holding the income was community.

The Ninth Circuit, in a two-to-one decision, followed the *Hammonds* case in *Black* v. *Commissioner*, 114 F. (2d) 355, holding that the income from Washington farm lands was community income to residents of Oregon.

We submit that the *Hammonds* and *Black* cases are wrongly decided and that the rule stated in them offers an easy means of tax avoidance which will adversely affect the public revenues.

Conclusion.

For the reasons stated, it is submitted that this petition should be granted, limited to the California rents issue.

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January, 1942.